BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JEFF H. BROOKS Claimant	)	
VS.	)	
KINCAID COACH LINES, INC. Respondent	)	Docket Nos. 1,067,241 & 1,068,011
AND	)	
BERKSHIRE HATHAWAY HOMESTATE INS. CO., and ACCIDENT FUND INS. CO. OF AMERICA Insurance Carriers	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the July 11, 2014, preliminary hearing Order entered by Administrative Law Judge (ALJ) William G. Belden. Daniel L. Smith of Overland Park, Kansas, appeared for claimant. Stephen P. Doherty of Overland Park, Kansas, appeared for respondent and Berkshire Hathaway Homestate Insurance Co. for Docket No. 1,067,241. Ronald J. Laskowski of Topeka, Kansas, appeared for respondent and Accident Fund Insurance Company of America for Docket No. 1,068,011.

In Docket No. 1,068,011, the ALJ found claimant's January 15, 2013, accident was not the prevailing factor causing claimant's need for medical treatment; therefore, claimant's request for medical treatment was denied. In Docket No. 1,067,241, the ALJ found claimant met his burden of proving his September 7, 2013, accident occurred and was the prevailing factor in causing claimant's injury and need for medical treatment. However, the ALJ determined claimant failed to meet his burden of proving he gave timely notice to respondent, and thus claimant's request for compensation was denied.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the January 29, 2014, Preliminary Hearing, and the transcript of the July 9,

2014, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant argues he proved the notice requirements of K.S.A. 2013 Supp. 44-520 were either waived or provided to respondent regarding Docket No. 1,067,241 and the injury occurring September 7, 2013. Claimant contends he sustained a compensable injury and is entitled to additional medical treatment by authorization of Dr. Charles Striebinger.

Respondent and Accident Fund argue the evidence proves claimant's January 15, 2013, accident was not the prevailing factor in causing claimant's injury. Further, although claimant gave proper notice in Docket No. 1,068,011, respondent and Accident Fund maintain notice of claimant's January 2013 incident does not constitute notice of claimant's September 2013 incident. Respondent and Berkshire argues the ALJ's Order should be affirmed, as claimant failed to provide timely notice of his injury in Docket No. 1,067,241.

The issues for the Board's review are:

1. Did claimant's injuries on January 15, 2013, and September 7, 2013, arise out of and in the course of his employment with respondent?

2. Did claimant provide timely notice of his injuries to respondent?

FINDINGS OF FACT

Claimant began employment with respondent in 2010 as a bus mechanic. In this position, claimant at times lifted objects weighing up to 200 pounds. Claimant testified lifting these objects put strain on his back and arms.

On January 15, 2013, claimant was repairing a bus door when it fell against him, pinning him between the door and a trash can. Claimant was "thrown back by the force of the door,"[1] and he bent backward over the trash can. Claimant testified he experienced immediate pain in his low back. Claimant informed his supervisor, Seth Hankins, of the incident the following day. Claimant testified:

> A. I told him I hurt my back and that I was going to take some Ibuprofen and then I let him know other times that my back hurt.
>
> Q. Did you ever indicate to him that you thought you might need to see the doctor?

[1] P.H. Trans. (July 9, 2014) at 13.

A. I told him I might, but I'd like to try Ibuprofen first.[2]

Claimant continued to work his regular duties following the incident. Claimant indicated he suffered occasional low back and groin pain, but his groin pain resolved prior to September 2013. From January through September 7, 2013, claimant continued to experience occasional low back pain without radicular symptoms, though he declined formal medical treatment during this period. Claimant testified he suffered an increase in his symptoms when his workload increased two weeks prior to the September 7, 2013, incident, but he continued to work his regular duties.

On Saturday, September 7, 2013, claimant was working alone in the shop replacing an alternator on a bus. Claimant stated the alternator weighed approximately 80-100 pounds, and he had to extend the alternator before him and bend forward to place it into position. Claimant explained:

> I had sharp pains run down my leg and my right toes and part way back to my foot went numb, so I dropped the alternator. I held it in there, I stood there a minute and I shoved it on in there and then I went and sat down for a while and it kind of eased up.[3]

Claimant completed his regular shift and went home without difficulty. Claimant testified he was unable to lie down that night due to his back, right leg and right foot pain. Claimant stated his foot pain was a new symptom not experienced prior to September 7, 2013.

The next morning, September 8, 2013, claimant called Mr. Hankins and said he was hurting and needed to see a doctor. Claimant did not tell Mr. Hankins about the alternator incident because he believed his condition was a continuation of the January 15, 2013, injury. Respondent's company clinic is Concentra, which is closed on Sunday. After consulting respondent's human resources department, Mr. Hankins advised claimant he could go wherever he wished for medical treatment.

Claimant presented at the Olathe Medical Center emergency room on September 8, 2013, with complaints of back pain. Claimant informed the hospital staff he sustained a work-related back injury in January 2013, and his central/right low back continued to bother him intermittently. He further noted "for about a week he has had gradually worsening pain in the right low back. It radiates to his toes at times. . . . [T]here is

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[2] *Id.* at 13-14.

[3] *Id.* at 19.

occasional numbness in the toes as well."[4] Claimant was provided pain medication and referred to Dr. Matthew Fieleke for follow up. Claimant was advised to avoid heavy lifting until his pain subsided.

Claimant spoke to Mr. Hankins following his release from Olathe Medical Center and was told to present at Concentra instead of reporting to work the following day. Claimant presented at Concentra on September 9, 2013, where he gave a history of sustaining a back injury at work on January 15, 2013. Claimant was diagnosed with right lumbar radiculopathy and lumbar strain and referred to physical therapy. An MRI performed on September 16, 2013, was interpreted as showing "chronic degenerative disease of the back" with "no specific impingement of any nerves described."[5] Claimant was informed on September 18, 2013, his condition was not work-related, and he was released from care.

Dr. Fieleke examined claimant on October 1, 2013. Claimant again gave a history of sustaining a back injury at work on January 15, 2013. Dr. Fieleke noted claimant experienced "real severe" back pain during the last week of August, though there is no mention of a September incident.[6] Dr. Fieleke reviewed claimant's MRI and determined claimant had moderate to severe canal stenosis and a large disk bulge at L4-5. Dr. Fieleke referred claimant to Dr. Striebinger, a neurosurgeon.

Dr. Striebinger examined claimant on October 15, 2013. While claimant provided a history involving his injury in January, he also informed Dr. Striebinger of the September alternator incident. Dr. Striebinger wrote, "Over the last month, the severe numbness and the pain has diminished but he continues to have pain [radiating] down the right leg."[7] After reviewing claimant's MRI, Dr. Striebinger noted:

> This shows rather marked degenerative changes in the lower lumbar spine. He has significant stenosis at the L3-4 and L4-5 and L5-S1 levels. He also has a herniated disc on the right side at the L4-5 level. This fits with his right leg pain that began on September 15 [*sic*].[8]

Dr. Striebinger opined claimant's disk herniation occurred as a result of the September 7, 2013, incident. He discussed treatment options with claimant, which

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[4] *Id.*, Resp. Ex. A at 4.

[5] *Id.* at 32.

[6] *Id.* at 26.

[7] *Id.* at 15.

[8] *Id.*

included lumbar epidural injections or a decompressive laminectomy to correct the spinal stenosis.

In October 2013, claimant completed an incident report for respondent claiming an injury sustained on January 15, 2013. Claimant did not complete a report regarding the September 7, 2013, incident, nor did he mention it to anyone at respondent. Respondent was provided a copy of an Application for Hearing filed with the Division on October 14, 2013, regarding the September 7, 2013, accident. Claimant testified he did not inform anyone at respondent of the September incident until subsequent to his January 13, 2014, deposition.

Dr. Vito Carabetta, a court-ordered independent medical evaluator, examined claimant on May 21, 2014, for purposes of an independent medical examination (IME). Claimant presented with a chief complaint of a constant aching pain in the midline of the lumbosacral region. After reviewing claimant's medical records, history, and performing a physical examination, Dr. Carabetta diagnosed claimant with a lumbar disk herniation. Dr. Carabetta wrote:

> From the description given, he was able [to] continue on with his usual work with the first injury, experience in limited occasional back pain, and nothing further. This was certainly not present on a constant basis. It is clear that the second injury that occurred on September 7, 2013 was instrumental and distinctly creating his present situation. He has a disk herniation, though limited in scope. He is not at maximum medical improvement. Additional medical treatment is reasonable and necessary in his case.[9]

Claimant continues to work for respondent. Claimant testified he currently suffers pain in both the right and left sides of his back, both legs, and into his right foot.

PRINCIPLES OF LAW

K.S.A. 2013 Supp. 44-501b states, in part:

> (a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.
>
> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable

[9] Carabetta IME (May 21, 2014) at 3.

to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2013 Supp. 44-508(h) states:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2013 Supp. 44-520 states:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

> (4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.
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> (b) The notice required by subsection (a) shall be waived if the employee proves that: (1) The employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.
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> (c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

K.S.A. 2013 Supp. 44-508(f)(1) states:

> "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

K.S.A. 2013 Supp. 44-508(d) states:

> "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[11]

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[10] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[11] K.S.A. 2013 Supp. 44-555c(j).

ANALYSIS

Docket No. 1,067,241

The ALJ found Claimant sustained personal injury by accident arising out of and in the course of his employment on January 15, 2013. The ALJ went on to find the accident was not the prevailing factor causing the herniated disc at L4-5 and the need for medical treatment. The undersigned Board Member agrees. The evidence of an injury by accident on January 15, 2013, is uncontroverted. Uncontroverted evidence may not be disregarded and is generally regarded as conclusive absent a showing it is improbable or untrustworthy.[12] As such, claimant's testimony supports a finding he suffered an injury by accident arising out of and in the course of his employment with respondent.

Whether claimant is entitled to medical treatment related to the compensable injury is a medical issue. In this docketed claim, claimant is requesting medical treatment with Dr. Strienbinger, who had recommended a decompressive laminectomy at L4-5. In his October 15, 2013, letter, Dr. Striebinger wrote he believed the disc herniation at L4-5 was the result of the September 2013 lifting incident. Dr. Carabetta thought it was clear that the September injury was instrumental and distinct in creating claimant's need for treatment.

The undersigned Board Member agrees with the ALJ the opinions of Drs. Striebinger and Carabetta are persuasive. Claimant failed to prove his need for medical treatment is the result of the January 15, 2013, injury by accident.

Docket No. 1,068,011

The ALJ found claimant met his burden of proving the incident of September 7, 2013, occurred. The ALJ found claimant's testimony consistent and credible. Claimant's testimony regarding the nature of his injury on September 7, 2013, is uncontroverted. The undersigned Board Member agrees claimant suffered an injury by accident arising out of his employment on September 7, 2013.

Noting the above discussion in Docket No. 1,067,241, the undersigned Board Member accepts the opinions of Drs. Striebinger and Carabetta that the September 7, 2013, injury is the prevailing factor for claimant's need for medical treatment.

Finally, the ALJ found claimant did not provide timely notice of his injury to respondent. The undersigned agrees. Claimant agreed he did not say anything to his employer about the September 7, 2013, lifting incident. Claimant testified he did not inform

[12] See *Anderson v. Kinsley Sand & Gravel*, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

his supervisor of the September 2013 immediately because he thought his symptoms were related to the January 2013 accident.

Prior to May 15, 2011, claimant believing his symptoms were related to a prior compensable injury may have been a legitimate reason to find just cause to extend the notice period. However, no just cause exception exists in the law applicable to this claim. K.S.A. 2013 Supp. 44-520(b) allows notice to be waived only if the employee proves the employer had actual knowledge of the injury, the employer was unavailable to receive notice or the employee was physically unable to give notice. None of the listed factors are found in the record.

Claimant argues telling respondent his pain had increased and he needed treatment on September 8, 2013, and respondent's advice to go to obtain treatment on his own, is sufficient to show notice of an injury on that date. K.S.A. 2013 Supp. 44-520(a)(4) requires notice, whether provided orally or in writing, to include the time, date, place, person injured and particulars of the injury, and that it be apparent from the content of the notice the employee is claiming benefits under the workers compensation act or has suffered a work-related injury. There is no evidence claimant told Mr. Hankins, when he asked for medical treatment on September 8, 2013, that he had experienced a sharp pain running down to his leg while lifting an alternator on the same date.

The Board has held in prior decisions that complaints of pain do not necessarily constitute notice of an injury.[13] Claimant did not provide notice of the time, date, place or particulars of an accident on September 7, 2013.

CONCLUSION

In Docket No. 1,067,241, claimant suffered an injury by accident arising out of and in the course of his employment with respondent on January 15, 2013. The January 15, 2013, accident is not the prevailing factor causing claimant's need for medical treatment.

In Docket No. 1,068,011, claimant suffered an injury by accident arising out of and in the course of his employment with respondent on September 7, 2013. The September 7, 2013, accident is the prevailing factor causing claimant's need for medical treatment. Claimant failed to prove he provided timely notice of the September 7, 2013, accidental injury as required by K.S.A. 2013 Supp. 44-520.

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[13] See *Bishop v. P1 Group, Inc.,* No. 1,065,448, 2014 WL 517228 (Kan. WCAB Jan. 27, 2014); *Lewis v. Sun Graphics, Inc.*, No. 1,031,707, 2007 WL 740432 (Kan. WCAB Feb. 28, 2007); *Shah v. Cessna Aircraft Company*, No. 1,002,287, 2003 WL 22994487 (Kan. WCAB Nov. 7, 2003).

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge William G. Belden dated July 11, 2014, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September, 2014.

_____
HONORABLE SETH G. VALERIUS
BOARD MEMBER

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